12-0566

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2012 MAR 26 PM 3:57

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

PAUL W. LIGHTNER,

Petitioner,

v.

Case No. 10-AA-76
(Judge Zakaib)

JANE L. CLINE, WEST VIRGINIA INSURANCE COMMISSIONER, CITIFINANCIAL, INC. and TRITON INSURANCE COMPANY,

Respondents.

[PROPOSED] ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER DENYING HEARING REQUEST OF COMPLAINANT BY THE WEST VIRGINIA INSURANCE COMMISSIONER AND DISMISSING APPEAL BY PETITIONER, PAUL W. LIGHTNER

On the 31st day of January, 2011, came the Petitioner, Paul W. Lightner ["Lightner"], by counsel, on his appeal of the April 5, 2010 Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant in Case No. 10-AP-RF-02000. Also came the Respondents, Jane L. Cline, West Virginia Insurance Commissioner ["Commissioner"], CitiFinancial, Inc. ["CitiFinancial"] and Triton Insurance Company ["Triton"], by their respective counsel. Upon review of the briefs submitted by the Petitioner and the Respondents and after hearing the arguments of counsel, the Court is of the opinion that the April 5, 2010 Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant should be affirmed based upon the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. This matter originated in the Circuit Court of Marshall County, West Virginia in 2002 when CitiFinancial instituted a civil action against Lightner after he defaulted on a $6,500 loan. Lightner filed an amended counterclaim in January 2004 through which he claimed that CitiFinancial had violated the finance charge provisions of the West Virginia Consumer Credit Protection Act, W.Va. Code §§46A-3-109 and 46A-5-101 [the "WVCCPA"] by charging

unreasonable and excessive amounts for credit insurance for two (2) other loans Lightner obtained from CitiFinancial in 2001. In October 2006, Lightner sought to expand his claim for unreasonable and excessive credit insurance charges into a class action to include additional individuals who obtained loans from CitiFinancial over a fourteen (14) year period;

2. The Marshall County action was removed to the United States District Court for the Northern District of West Virginia, but was ultimately remanded back to the Circuit Court of Marshall County. On November 1, 2007, CitiFinancial filed an opposition to Lightner's motion for class certification, in addition to motions seeking partial summary judgment, dismissal or a stay pending an administrative proceeding. On May 5, 2008, the Circuit Court of Marshall County denied each of CitiFinancial's motions. On May 12, 2008, the Circuit Court entered an Order granting Lightner's motion for class certification;

3. CitiFinancial filed a petition for writ of prohibition before the Supreme Court of Appeals to prevent the Circuit Court of Marshall County from enforcing its denial of CitiFinancial's motion for partial summary judgment. CitiFinancial asserted that it was entitled to a dismissal of the claims pending against it that involved allegations of unreasonable and excessive credit insurance charges because the rates had been approved by the Commissioner. Alternatively, CitiFinancial requested that Lightner's claims be stayed under the doctrine of primary jurisdiction until the Commissioner determined the reasonableness of the charges;

4. The Commissioner submitted an *amicus curiae* brief in support of the petition for writ of prohibition. In its submission, the Commissioner made clear that the *amicus curiae* brief was filed for the limited purpose of discussing the role of the Commissioner in establishing premium rates for credit insurance and that it was not the intention of the Commissioner to comment upon the facts of the underlying dispute between the parties. Rather, the Commissioner wanted to remind the Supreme Court of Appeals of her statutory role and to

discuss the Legislature's intent in enacting a very comprehensive regulatory system for the insurance industry. The Commissioner further noted that within the statutory framework of the Insurance Code there was a remedy established to address concerns about the reasonableness of premium rates and that a person who had concerns about the reasonableness or excessiveness of rates could avail themselves of the process. In short, the Commissioner took the position that the authority reposed to the Commissioner was the available and appropriate method for determining the reasonableness of insurance rates;

5. On December 10, 2008, the Supreme Court of Appeals issued its opinion in *State ex rel CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). The Court issued four (4) *Syllabus Points*, three (3) of which are relevant to Lightner's current petition. In *Syl. Pt.* 2, the Court stated "...the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner." In *Syl. Pt.* 3, the Court found that "[a]ny challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to provisions of W.Va. Code §33-20-5(d) (1967) (Repl. Vol. 2006) in a proceeding before the Insurance Commissioner." Finally, in *Syl. Pt.* 4, the Court stated that "[t]he presumption of statutory compliance for approved insurance rates set forth in W.Va. Code §33-6-30(c) (2002) (Repl. Vol. 2006) may only be rebutted in a proceeding before the Insurance Commissioner." The Supreme Court of Appeals issued a writ of prohibition to prevent the enforcement of the May 5, 2008 Order of the Circuit Court of Marshall County denying partial summary judgment to CitiFinancial with regard to claims for alleged unreasonable and excessive credit insurance charges. The portion of the May 12, 2008 Order certifying a class action was subsequently vacated by the Circuit Court of Marshall County. The Order further stayed all remaining claims of both CitiFinancial and Lightner pending notification by Lightner of the results of the administrative proceeding before the Commissioner;

6. Lightner filed a Consumer Complaint before the Commissioner on or about September 29, 2009. The Consumer Complaint was filed on behalf of himself and other policyholders concerning the purchase of certain insurance policies entitled or known as "credit property" insurance and "credit involuntary unemployment" insurance ["IUI"]. (R. 1-347). The Consumer Complaint named as respondents CitiFinancial and Triton because Triton was the insurer actually issuing any applicable policies for credit property and IUI sold by CitiFinancial. The complaint, with exhibits, consisted of hundreds of pages. *Id.* In the complaint, Lightner contended that historical low loss ratios incurred by CitiFinancial and Triton as opposed to projections and filings were indicative of excessive rates and therefore violative of the Insurance Code. Lightner also asserted that Triton was not forthcoming with relevant information provided in its filings which should, in turn, cause the filings to be rejected. Lightner also requested a hearing pursuant to W.Va. Code §33-2-13 (1957), W.Va. Code §33-20-5(d) (1967), and W.Va. C.S.R. §114-13-1, *et seq.* (2003), on the administrative complaint. Lightner also sought an Order from the Commissioner withdrawing approval for the rate filings of Triton over a period of fourteen (14) years;

7. By letter dated November 13, 2009, the Commissioner advised that she wanted to investigate the issues raised in the Consumer Complaint for a ninety (90) day period following which the Commissioner would make the following decisions: (1) whether to appoint a Hearing Examiner to hear the issues in the matter; (2) whether to intervene in the matter; and/or (3) whether to take a final position on potentially denying a hearing in the matter on the substantive issues. (R. 442-448);

8. The Commissioner subsequently undertook an independent investigation and analysis of not only the allegations in Lightner's Consumer Complaint, but also examined all Triton rate filings in the State of West Virginia pursuant to W.Va. Code §33-2-3a (2007) and W.Va. Code §33-2-9 (2007),

> "To ascertain relevant and pertinent facts to determine if she should take immediate action as opposed to holding an administrative hearing based upon the complexity of the issues, the challenges for the lay public to put forth effective arguments, the expertise of the Commissioner concerning these complex issues and the resources available to her for determination of these issues, for a just and clear resolution of the issues, and to make sure uniformity of judgment for all policyholders in this state occurs as oppose to a singular administrative hearing examination result which may be inconsistent with the policyholder pool as a whole in the State capitol of West Virginia."

(R. 535-550);

9. During the investigation, the Commissioner requested data from Triton which resulted in the production of thousands of pages of documents. (R. 1454-3703). There were also discussions between the Commissioner and representatives of Triton concerning the information supplied and the impact of the information on the Commissioner's broad-based investigation. In connection with the pending and parallel Consumer Complaint, Lightner was likewise afforded the opportunity to provide additional information and argument in support of his position. In particular, Lightner supplied reports from Insurance Departments in California and Arizona concerning credit property and credit unemployment insurance and submitted a presentation entitled "Summary of the Evidence." Lightner also supplied an e-mail to the Commissioner indicating that he was unable to find a benchmark or minimum loss ratio for credit property or credit unemployment insurance in the State of Texas. (R. 956-1435). All told, Lightner submitted four hundred and seventy-nine (479) pages of information in addition to the hundreds of pages supplied with the original Consumer Complaint;

10. The Commissioner also retained the services of an independent actuary to review the filings made by Triton. The actuary was asked to comment on whether the filings were complete and whether the loss ratio, expense and profit components of the rate were reasonable and typical for the coverages provided. The independent expert, Hause Actuarial Solutions, Inc., issued an eleven (11) page report dated March 29, 2010. (R. 940-951);

11. Following the investigation, the Commissioner filed the April 5, 2010 Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant ["Order"]. The Order consists of sixteen (16) pages and contains specific findings of fact related to the March 17, 1997 Credit IUI filing, the February 16, 1999 Credit IUI filing, the February 26, 2001 Credit IUI filing, the January 19, 1996 Credit Property filing, the June 5, 2003 Credit Property filing as well as additional findings. Some of the additional findings included "that during the period contained in the Complainant's administrative complaint, Triton did not write credit property nor credit involuntary unemployment insurance wherein any rule as in effect concerning benchmark minimum loss ratio standards for writing either product in the State of West Virginia"; that "both parties were able to provide relevant information, data or other comment concerning their respective positions in the context of her investigation and analysis of these violations to fulfill her duties under W.Va. Code §33-20-5(c) (1967)"; that there is "no duty placed upon insurers offering insurance as referenced in the Complainant's administrative complaint to re-file rates once approved where there is no change in circumstances of the original filing"; "rates filed by insurance companies in other states are neither necessarily relevant nor dispositive as to what a rate should be in West Virginia"; [h]istorically low loss ratios in relation to what is filed as anticipated loss ratios with the OIC concerning credit property and/or credit involuntary unemployment insurance do not by themselves constitute an excessive rate violation and that claim ratios have been known to fluctuate widely from company to company, state to state and year to year; *See* Order, Paragraphs 29-30, 32, 34-36. Many of these findings mirror the opinions expressed by the independent actuary retained by the Commissioner. (R. 940-955);

12. The Order also made numerous conclusions of law, including that Triton did comply with W.Va. Code §33-20-3 (2006) in its filings and that Triton's rate filings did not violate W.Va. Code §33-20-3 (2006). The Commissioner further found that there "is no factual dispute

as concerning the filing and approval of the rates and forms of Triton Insurance Company" and that the rates charged by Triton were reasonable in relation to the benefits provided. Finally, the Commissioner also found and ordered that a hearing upon the administrative complaint would serve no useful purpose and, therefore, the request for a hearing was denied;

13. On May 5, 2010, Lightner filed his petition appealing the Commissioner's April 5, 2010 Order pursuant to W.Va. Code §29A-5-4(a) and W.Va. Code §33-2-14;

14. Lightner's petition alleges a number of irregularities with respect to the Commissioner's April 5, 2010 Order. Lightner's contentions can be succinctly stated as follows:

- The Commissioner erroneously concluded that Lightner was not entitled to a hearing in connection with the claims contained in the Consumer Complaint;
- The Commissioner erroneously concluded that the Insurance Code permits her to deny a hearing to an aggrieved individual who demands one;
- The Commissioner erroneously failed to require Triton to provide Lightner with all "pertinent information" concerning the rates at issue as required by the Insurance Code;
- The Commissioner erroneously found that Triton's credit property and credit involuntary employment insurance charges were not excessive and were reasonable in relation to the benefits provided;

15. Lightner's petition requests eight (8) forms of relief. Specifically, Lightner requests:

- That the Commissioner's April 5, 2010 Order should be modified or reversed because it violates statutory and constitutional provisions. W.Va. Code §29A-5-4(g)(1);
- The Commissioner's April 5, 2010 Order should be modified or reversed because it was made upon unlawful procedures. W.Va. Code §29A-5-4(g)(3);
- The Commissioner's Order should be modified or reversed because it is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record and the evidence erroneously excluded due to procedural irregularities. W.Va. Code §29A-5-4(g)(5);

- The Commissioner's Order should be modified or reversed because it is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W.Va. Code §29A-5-4(g)(6);

- The Circuit Court should conduct the hearing that Lightner is entitled to, take evidence, hear argument, and rule on the issues presented. W.Va. Code §33-2-14 and W.Va. Code §33-20-5(d);

- Lightner should be allowed to present evidence and argument in support of his defense and compulsory counterclaim. W.Va. Code §29A-5-4(f);

- The Circuit Court should enforce Lightner's right to obtain the statutory "pertinent information" concerning the rates at issue and order Triton to produce all such information immediately. W.Va. Code §33-20-9;

- The Circuit Court should order the Commissioner to produce a full record of the information considered or relied upon in making the findings and conclusions contained in the April 5, 2010 Order;

16. The Commissioner and CitiFinancial and Triton have responded to Lightner's petition. CitiFinancial and Triton filed their response before this Court on September 22, 2010. In that response, CitiFinancial and Triton maintain:

- Triton's rates were thoroughly reviewed and analyzed in full compliance with statutory and regulatory requirements;

- Lightner has no automatic right to a formal hearing before the Commissioner;

- Lightner's claim of unreasonable rates was the subject of a proceeding meeting statutory and constitutional requirements;

- Lightner is not entitled to present evidence or conduct discovery and the affidavit of Hanley Clark should be stricken;

17. In her response, the Commissioner maintained:

- Lightner is not entitled to a hearing as a matter of right. The Commissioner's denial of a hearing is consistent with the Supreme Court of Appeals' decision in *State ex rel. CitiFinancial v. Madden*. The denial of a hearing is also consistent with the provisions of W.Va. Code §33-20-5(c)(d)(1967) and W.Va. CSR 114-13-1, *et seq.*;

- No definitive benchmark was or is in place with respect to what loss ratios should be for credit property and involuntary unemployment insurance. The credit property rule dealing with benchmark loss ratios was adopted

in 2003 after Triton stopped writing such coverage and West Virginia has never adopted a benchmark loss ratio rule concerning IUI;

- The Commissioner fulfilled all of her statutory duties concerning the Consumer Complaint. The Commissioner conducted an independent investigation and issued a separate data call to Triton and CitiFinancial;
- Model rules of the National Association of Insurance Commissioners are neither binding nor persuasive;
- Lightner has had more than ample opportunity to present his claims in multiple forums over a number of years;

18. On December 7, 2011, Lightner submitted Petitioner's Notice of Supplemental Authority. The notice of supplemental authority cited to an Order entered by the Circuit Court of Kanawha County, West Virginia in *Bunch Co. v. Jane Cline, WV Insurance Commissioner, et al.* Docket No. 10-AA-113 (Kaufman, J.);

19. On March 2, 2012, CitiFinancial and Triton submitted a response to Petitioner's Notice of Supplemental Authority.

CONCLUSIONS OF LAW

20. There are two (2) statutes which apply to judicial review of decisions from the Commissioner. W.Va. Code §33-2-14 is specific to appeals from orders entered by the Commissioner and provides that "[t]he court or judge shall, without a jury, hear and determine the matter upon the record of proceedings before the commissioner, except that for good cause shown the court may permit the introduction of additional evidence, and may enter an order revising or reversing the order of the commissioner, or may affirm such order or remand the action of the commissioner for further proceedings." Also applicable is W.Va. Code §29A-5-4(g) which falls under the State Administrative Procedures Act ["APA"]. It provides:

> "The court may affirm the order or decision of the agency or remand that case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
> (1) in violation of constitutional or statutory provisions; or

(2) in excess of the statutory authority or jurisdiction of the agency; or
(3) made upon unlawful procedures; or
(4) affected by other error of law; or
(5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(6) arbitrary or capricious or characterized by abusive discretion or clearly unwarranted exercise of discretion."

21. Under the APA, a reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the Court would have reached a different conclusion on the same set of facts. *Gino's Pizza of West Hamlin, Inc. v. W.Va. Human Rights Commission*, 187 W.Va. 312, 418 S.E.2d 758 (1992); *CDS, Inc. v. Camper*, 190 W.Va. 390, 438 S.E.2d 570 (1993); *Ruby v. Insurance Commission*, 197 W.Va. 27, 475 S.E.2d 27 (1996). In that vein, the Supreme Court of Appeals utilizes "clearly wrong" and "arbitrary and capricious" standards of review which are deferential and presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Stewart v. W.Va. Board of Examiners for Registered Professional Nurses*, 197 W.Va. 386, 475 S.E.2d 478 (1996), citing *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995); *Accord, Wheeling-Pittsburgh Steel Corp. v. Rowling*, 205 W.Va. 286, 517 S.E.2d 763 (1999) ("[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code §29A-5-4 and reviews questions of law presented *de novo*, findings of fact by the administrative officer are accorded deference unless the reviewing court believes the finding to be clearly wrong.");

22. The Court finds that Lightner's petition should be denied and the Commissioner's April 5, 2010 Order affirmed. The Commissioner's findings, including that there was no rule in effect concerning benchmark minimum loss ratio standards for the products in West Virginia, that Triton's rate filings did not violate W.Va. Code §33-20-3 and that the rates charged were reasonable in relation that the benefits provided, should be accorded substantial deference and

left undisturbed. They are supported by the record as a whole and are not erroneous, let alone clearly erroneous. More importantly, the findings originate from an extensive process which spans several months and consisted of review and analysis of thousands of pages of documents and data, including several submissions by Lightner. The review and analysis included the retention of an independent actuary. Simply stated, the Commissioner's April 5, 2010 Order was a result of an exhaustive review and one which fully comports with all legal requirements. This Court cannot and should not substitute its judgment for that of the Commissioner;

23. The Commissioner is charged with regulating the insurance industry in West Virginia. She is vested with the duty and authority to enforce the provisions of Chapter 33 of the W.Va. Code. Her authority is exclusive and it is recognized that the Commissioner [Offices of Insurance Commissioner] is the agency with the expertise to address insurance regulation. *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008) ("these issues, due to their highly specialized nature, are typically reserved to the Commissioner's bailiwick.). Among the authority vested in the Commissioner is the authority to regulate and approve rates charged by insurers. W.Va. Code §33-20-3(4). The Commissioner is also empowered to conduct investigations and examinations of insurers with respect to rates and other issues. W.Va. Code §33-2-3a. W.Va. Code §33-2-9(a) specifically provides that the provisions of that section are "intended to enable the commissioner to adopt a flexible system of examinations which directs resources as may be considered appropriate and necessary for the administration of the insurance and insurance related laws of the state." Consistent with this flexibility, the Legislature has also vested in the Commissioner the authority to promulgate rules and regulations to discharge the duties and powers provided under Chapter 33. W.Va. Code §33-2-10. As a result, the Commissioner has promulgated 114 CSR 13-1 *et seq.* which set forth the practice and procedure for hearings before the Commissioner;

24. Against this backdrop of broad and specialized authority, this Court is of the opinion that the Commissioner's handling of the issues raised by Lightner's Consumer Complaint was entirely appropriate. Certainly, there is nothing in the record to support the contention that the Commissioner violated or acted in excess of statutory authority or that her April 5, 2010 Order was otherwise clearly wrong;

25. One of Lightner's principal bases for challenging the Commissioner's April 5. 2010 Order is the contention that the Order was entered without the Commissioner following statutory and regulatory requirements, most notably the alleged failure to provide a timely and formal hearing. The Court is of the opinion that this challenge is not well taken as the record reflects that the Commissioner's Order was entered following an extensive investigation which was based not only upon Lightner's Consumer Complaint, but also upon the independent investigation conducted by the Commissioner pursuant to separate statutory authority. In fact, the rate issues were the subject of parallel and complimentary proceedings – proceedings which allowed for extensive factual development and which satisfied all statutory and regulatory requirements;

26. Lightner filed his Consumer Complaint on September 28, 2009. It consisted of hundreds of pages, with exhibits [R.1-347]. He demanded a hearing which was his right to request. He also requested that witness subpoenas *duces tecum* be issued. At that point, the Rules of Practice and Procedure for Hearings before the West Virginia Insurance Commissioner ["Rules"] were triggered. Those Rules, promulgated pursuant to express statutory authority, do not contain any provision for the conduction of discovery including the issuance of witness subpoenas *duces tecum*. They also vest within the Commissioner the authority to refuse to grant a hearing if it is deemed to serve no useful purpose. 114 CSR 13-3;

27. Following the filing of the Consumer Complaint, the Commissioner determined that she wanted to undertake an independent investigation of the rate issues raised by Lightner.

The Commissioner clearly possesses this authority under W.Va. Code §33-2-3a and -9. The power vested in the Commissioner to examine insurers and require the production of documents, data or other information is extremely broad. Indeed, it is broader than the Rules applicable to hearings conducted at the request of a complainant. The Commissioner's decision to independently investigate the issues raised in the Consumer Complaint was communicated to the parties in a letter dated November 13, 2009. [R.445-448]. In the letter, the Commissioner advised that she wanted a ninety (90) day period to investigate the issues raised in the Consumer Complaint to decide what action should be taken. The Commissioner further requested an agreement by the parties to this extension of time for her to conduct the investigation. Lightner provided only provisional consent and insisted that any extension of the time by which a hearing could be conducted had to be conditioned upon an agreement by the Commissioner to actually conduct a hearing. The Commissioner did not agree to conduct a hearing and it was clear to Lightner that whether a hearing would be held was an issue to be later resolved. The Court finds it significant that Lightner did not challenge the Commissioner's decision to use a ninety (90) period to investigate the issues raised in the Consumer Complaint. Had Lightner truly felt aggrieved by the Commissioner's action, he could have filed a petition for writ of mandamus contending that the provisions of the Rules were being violated or that his rights were otherwise being adversely affected. Lightner took no such course of action;

28. The Court finds that the independent investigation conducted by the Commissioner was extensive. She compelled Triton to produce thousands of pages of documents and data. The Commissioner also requested and received information from Lightner including allowing Lightner to provide a summary of the evidence which Lightner maintained supported a conclusion that the rates charged by CitiFinancial and Triton were unreasonable. Significantly, the Commissioner also obtained an independent actuary opinion. (R.940-955);

29. This Court is also of the opinion that the findings and conclusions which resulted from the Commissioner's investigation are entitled to substantial deference and are not clearly erroneous. Specifically, the Commissioner found that there was no rule in effect setting forth benchmark minimum loss ratio standards for either credit property or credit involuntary unemployment insurance during the time period those products were offered by Triton. The Commissioner also concluded that the filings made by Triton were complete and approved on a going forward basis at the time of filing; that Triton did in fact comply with the provision of W.Va. Code §33-20-3 with respect to its filing; and, that the rates charged by Triton were reasonable in relation to the benefits provided. Those findings were supported, in large part, by the independent actuary opinion obtained by the Commissioner;

30. In concluding that the findings set forth in the Commissioner's April 5, 2010 Order are entitled to substantial deference and are not clearly erroneous, the Court finds noteworthy that Lightner cannot point to a single standard *adopted in West Virginia* which Triton's rates or the resulting loss ratios violated. Lightner's reference to model standards or even the decisions of other states is simply irrelevant. West Virginia has, in the past, enacted standards governing loss ratios for other insurance products but not involving credit property or involuntary unemployment insurance. *See* W.Va. Code §33-16-1, *et seq.* (repealed in 2002) (applying benchmark minimum standards to certain accident and sickness insurance products including accident only, sickness only, disability, sickness only disability, accident only disability, hospital indemnity and specified disease in travel accident insurance policies). Under these circumstances, the Court cannot conclude that the decision of the Commissioner that Triton's rates were and are reasonable and appropriate is arbitrary or capricious;

31. The Court is also of the opinion that all of the actions leading up to the issuance of the Commissioner's April 5, 2010 Order satisfied statutory and regulatory requirements. The Commissioner is clearly vested with substantial authority to conduct an independent

examination or investigation of rates even after they are in effect. W.Va. Code §33-20-5(c). The employment of an actuary to assist in conducting the investigation is also specifically authorized by statute. W.Va. Code §33-2-9(i)(5). The timeliness of the Commissioner issuing her Order as well as in determining that a hearing would serve no useful purpose was appropriate because of the mutual agreement of the parties. Moreover, the forty-five (45) day deadline by which a hearing is supposed to be held is directory and not mandatory. *See e.g. Brock v. Pierce Co.*, 476 US 253 (1986); *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007) (cases recognizing that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with a provision);

32. The Court also concludes that the Commissioner's finding that a hearing on the Consumer Complaint would serve no useful purpose was appropriate in that Lightner has no automatic right to a formal hearing and his due process rights were fully protected. Challenges to an existing rate by an "aggrieved person" are specifically addressed in W.Va. Code §33-20-5(d). The statute provides:

> "(d) any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the Commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order."

This statute, the one under which the Commissioner conducted, in part, the investigation into Triton's rates, does not specifically state that a hearing shall be provided with respect to any filing *in effect*. Moreover, W.Va. Code §33-2-14, one of the appeal statutes upon which Lightner's petition is based, specifically provides that "[a]n appeal from the Commissioner shall be taken from an order entered after a hearing *or an order refusing a hearing*." Finally, it is

not insignificant that the right of the Commissioner to determine that a hearing may not serve a useful purpose is embedded in the rules and regulations promulgated by the Commissioner *pursuant to statutory authority*. 114 CSR 13-3.3 provides:

> "Hearing on Written Demand. – When the commissioner is presented with a demand for a hearing as described in subsections 3.1 and 3.2 of this section he or she shall conduct a hearing within forty-five (45) days of receipt by him or her of such written demand unless postponed to a later date by mutual agreement. However, if the commissioner shall determine that the hearing demanded:
>
> a. Would involve an exercise of authority in excess of that available to him or her under law; or
>
> b. *Would serve no useful purpose*, the commissioner shall, within forty-five (45) days of receipt of such demand, enter an order refusing to grant the hearing as requested, incorporating therein his or her reasons for such refusal. Appeal may be taken from such order as provided by W.Va. Code §33-2-14. (emphasis supplied)

33. The above authority clearly reflects that the Commissioner is permitted to perform a gatekeeping function and determine that a hearing would not be useful. Otherwise, the Commissioner would be required to grant a formal hearing upon every complaint that may be filed in West Virginia on any insurance rate. Such a result would not only be unwieldy but also absurd;

34. This Court rejects Lightner's suggestion that the decision by the Supreme Court of Appeals in *State ex rel CitiFinancial, Inc. v. Madden* or the Commissioner's *amicus curiae* brief mandate or acknowledge the right to a hearing. The position advanced by the Commissioner before the Supreme Court of Appeals was simply that the *process* set forth in W.Va. Code §33-20-5(d) was available to an individual who might have concerns about the reasonableness of premium rates. Likewise, the opinion of the Supreme Court of Appeals merely recognized that the *process* set forth in W.Va. Code §33-20-5(d) had to be utilized by any aggrieved person. As stated in *Syl. Pt.* 3 :

> "Any challenges to a approved insurance rate by an aggrieved person or organization should be raised pursuant to the provisions of W.Va. Code §33-20-5(d) (1967) (Repl. Vol. 2006) in a proceeding before the Insurance Commissioner."

Simply stated, the Supreme Court of Appeals merely indicated that a *proceeding* before the Insurance Commissioner is what would be necessary. It did not state that a formal hearing was required. In this case, Lightner's Consumer Complaint was indeed the subject of a proceeding before the Commissioner which resulted in the entry of the April 5, 2010 Order;

35. The Court likewise finds that the proceeding before the Commissioner not only met statutory requirements, but also satisfies constitutional standards. Initially, Lightner's suggestion that he is entitled to "his day in court" because he has raised the unreasonable rate issue as a defense and counterclaim is mistaken. The Supreme Court of Appeals has laid to rest any notion that the existence of a defense or cause of action create some rights greater than that enjoyed under the existing provisions of the Insurance Code. As stated by the Court in *Syl. Pt.* 2 of *State ex rel. CitiFinancial, Inc. v. Madden*:

> "In providing for a cause of action that permits the recovery of excess charges included in a consumer credit transaction pursuant to the provisions of W.Va. Code §46A-3-109 (1998) (Repl. Vol. 2006) and §46A-5-101 (1996) (Repl. Vol. 2006), the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the commissioner."

Thus, Lightner's claim of unreasonable rates, whether posited as a defense or counterclaim or as an aggrieved person, is to be handled exclusively by the Commissioner. Raising the specter of a constitutional violation does nothing to escape the clear mandate of the Supreme Court of Appeals;

36. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 US 471 (1972). Depending on the circumstances and the interests at stake, a fairly extensive

evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated. In other instances, however, the United States Supreme Court has upheld procedures affording less than a full evidentiary hearing if "some kind of a hearing" insuring an effective "initial check against mistaken decisions" is provided before the deprivation occurs, and a prompt opportunity for complete administrative and judicial review is available. *Matthews v. Eldridge*, 424 US 319, 349 (1996). Based on these principles, the United States Supreme Court has developed a three (3) factor balancing test to determine what type of due process is due:

> "First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Matthews, 424 US at 335;

37. The Court finds that the *Matthews* factors are more than satisfied in this case. The interest in challenging a rate is minimal particularly when an administrative agency is empowered to regulate rates. Moreover, the Commissioner must act as a gatekeeper and assess whether the circumstances dictate a formal hearing. If the Commissioner was to permit a formal hearing upon each request, the additional time and cost associated with a formal hearing would substantially burden the Commissioner's ability to discharge her duties efficiently. Moreover, Lightner's claim of unreasonable rates was considered by the Commissioner based upon an extensive record including detailed, expert evaluations of objective data as well as Lightner's own voluminous submission. Triton was required to produce thousands of pages of documents and data. An independent actuary was retained who submitted an extensive report. Lightner was given the opportunity to submit additional materials over and above the Consumer Complaint in an *ex parte* fashion which included a presentation entitled "Summary of the

Evidence," (R.1316-1434). The independent and complimentary investigation conducted by the Commissioner lasted for several months before the April 5, 2010 Order was entered. Clearly, the procedures utilized by the Commissioner provided adequate procedural safeguards and did not deny procedural due process;

38. It bears mentioning that Lightner fails to identify any evidence he was prevented from presenting to the Commissioner. Nor does he identify what discovery he should have been permitted to conduct and how that would have affected the Commissioner's determination, particularly in the face of the extensive independent investigation conducted by the Commissioner. In fact, the Court finds Lightner's position to be internally inconsistent. He argues vigorously in his brief that the record reflects that Triton's credit property and IUI rates are unreasonable and that Triton concealed its unreasonable loss ratios. If this conclusion was warranted – which the Court finds it is not due to the deference it accords the Commissioner – it only stands to reason that there has been more than adequate development of the record to support the claims asserted;

39. This Court further concludes that Lightner's assertion that he should be entitled to present evidence and conduct discovery before this Court is untenable. The presentation of evidence in an administrative appeal is unfavored and strictly limited. As for the request for discovery, there is no support whatsoever for permitting discovery in an administrative appeal. In fact, there is no provision for discovery under the Rules applicable to matters considered before the Commissioner. Lightner's citation to a general statute requiring an insurer to provide pertinent information for a rate is hardly the equivalent of a right to conduct discovery. To grant Lightner's request would be the equivalent to permitting Lightner do exactly which the Supreme Court of Appeals held was impermissible – litigate a rate challenge in the Circuit Court;

40. In *State ex rel. CitiFinancial, Inc. v. Madden*, *supra*, the Court made it clear that judicial review of a determination by the Commissioner on the issue of whether insurance rates

are reasonable and in compliance with statutory requirements is under the APA. Under the APA, the ability to present evidence in an appeal of a contested case is extremely limited. *See* W.Va. Code §29A-5-4(f) (limiting review to the record made before the agency, except in cases of alleged irregularities in procedure before the agency not shown in the record); *See also* Rule 6 of the West Virginia Rule of Procedure for Administrative Appeals (directing circuit court to only consider evidence which was made part of the record in the proceeding before the administrative agency unless there are alleged irregularities in the procedure before the agency, not shown on the record). Clearly, this appeal is to be decided on the record developed before the Commissioner. That record is quite voluminous. Here, there is no alleged irregularity that isn't a matter of record. Lightner complains that he was not granted a formal hearing. That is apparent from the record and there is no evidence or testimony to adduce on that particular issue. Moreover, Lightner cannot cite good cause for the introduction of any additional evidence. He fails to identify with specificity what evidence he maintains should be introduced. This is particularly applicable to Lightner's attempt to utilize the affidavit of former Insurance Commissioner Hanley C. Clark. That affidavit is dated eight (8) days after the entry of the Commissioner's April 5, 2010 Order. There is no explanation why this affidavit was not tendered with the filing of the original Consumer Complaint or in any of the subsequent submissions Lightner made to the Commissioner. Thus, this Court cannot and does not consider the affidavit as part of this review.

41. Finally, this Court does not find persuasive or binding the supplemental authority submitted by Lightner. That supplemental authority consists of an October 31, 2011 Order entered by the Circuit Court of Kanawha County, West Virginia in *Bunch Co. v. Jane Cline, WV Insurance Commissioner, et al.*, Docket No. 10-AA-113 (Kaufman, J). A review of this Order reveals that the case is not "strikingly similar" as represented by Lightner. In fact, the Order makes no finding with regard to whether the Commissioner was required to afford a hearing to

the Petitioner. The affidavit which the Circuit Court found to be fatally defective was one which the Court, in its Order, stated had been submitted in a separate civil action and was not litigated in the case. Moreover, unlike the present case, *Bunch Co.* did not involve a situation where the Commissioner had conducted a parallel and complimentary investigation pursuant to her statutory authority which resulted in the production and analysis of thousands of pages of additional documents and information.

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby ORDERED that the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant, dated April 5, 2010, in Insurance Case No. 10-AP-RF-02000 is AFFIRMED. The objections and exceptions of the petitioner are preserved and noted. The Circuit Clerk is directed to distribute copies of this Order to all counsel of record with this appeal now being dismissed from the docket of the Court.

ENTERED this 26th day of March, 2012.

Honorable Paul Zakaib, Jr.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 26TH DAY OF MARCH, 12.
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BEFORE THE HONORABLE JANE L. CLINE
INSURANCE COMMISSIONER
STATE OF WEST VIRGINIA

IN RE:

PAUL W. LIGHTNER,

COMPLAINANT,

v. 10-AP-RF-02000

CITIFINANCIAL, INC., AND TRITON INSURANCE COMPANY,

RESPONDENTS.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER DENYING HEARING REQUEST OF COMPLAINANT

NOW COMES the duly appointed Insurance Commissioner of the State of West Virginia, Jane L. Cline, who has jurisdiction and authority to act under West Virginia Code §33-2-3 (1993) and enters this Order denying the hearing request of Complainant for the reasons and findings contained herein this Order.

I. PROCEDURAL POSTURE

Complainant, Paul Lightner, originally filed a class action in the Circuit Court of Marshall County wherein he sought damages under the West Virginia Consumer Credit Protection Act (W.Va. Code §46A-3-109 (1998) and §46A-5-101 (1996)). Additionally, Complainant alleged excessive rates used by Respondents in insurance policy sales transactions. The Supreme Court of Appeals, in State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner,

223 W.Va. 229, 672 S.E.2d 365 (2008), issued a Writ of Prohibition preventing the Circuit Court from enforcing its order of May 6, 2008, through which Petitioner, CitiFinancial, Inc.'s motion for partial summary judgment was denied by failing to dismiss claims asserted against Petitioner, CitiFinancial, Inc. by Respondent, Paul W. Lightner for alleged unreasonable and excessive credit insurance charges. The Supreme Court of Appeals determined that "the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner. *Id.* at 238, 374. Further, the Court stated, "It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to the permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction." *Id.* at 237, 373. The Court additionally discussed, "A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this matter then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner." *Id.*

Subsequent to the above referenced case, the Complainant, Paul Lightner filed his administrative complaint with the Offices of the West Virginia Insurance Commissioner on or about September 29, 2009, on behalf of himself and other policyholders concerning purchase of

certain insurance policies entitled or known as "credit property" insurance and "credit involuntary unemployment" insurance. Complainant asserts that historical low loss ratios incurred by the Respondent as opposed to projections in filings are indicative of excessive rates and therefore violative of the code. Complainant also asserts that the Respondent was not forthcoming in relevant information provided in its filings which should in turn cause such filings to be rejected retroactively.

Complainant seeks a hearing pursuant to W.Va. Code §33-2-13 (1957), W.Va. Code §33-20-5(d) (1967), and W.Va. Code R. §114-13-1, *et seq.* (2003) on his administrative complaint for a period of time between 1994 to the present. Complainant seeks an Order from the Commissioner withdrawing approval for the rate filings of Triton Insurance Company over the entire previously referenced period of over 14 years.

The Insurance Commissioner, who not only has hearing authority on these matters as previously referenced in the proceeding paragraph, has "continuing authority to disprove an insurance rate for noncompliance with the requirements of chapter thirty-three, article twenty." *See W.Va. Code §33-20-5(c) (1967). Cited in* State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner, 223 W.Va. 229, 236, 672 S.E.2d 365, 372 (2008).

Consequently, the Insurance Commissioner undertook unilateral investigation and analysis of these allegations pursuant to her authority under W.Va. Code §33-2-3a (2007) and W.Va. Code §33-2-9 (2006) to ascertain relevant and pertinent facts to determine if she should take immediate action as opposed to holding an administrative hearing based upon the complexity of the issues, the challenges for the lay public to put forth effective arguments, the

expertise of the Commissioner concerning these complex issues and the resources available to her for determination of these issues, for a just and clear resolution of the issues, and to make sure uniformity of judgment for all policyholders in the state occurs as opposed to a singular administrative hearing examination result which may be inconsistent with the policyholder pool as a whole in the State of West Virginia.

Pursuant to W.Va. Code §33-2-9 (2006) and §33-2-19 (2007), while privileged and confidential information may be obtained during those analytical and investigative proceedings, the Commissioner is permitted to use such information in furtherance of her legal and regulatory duties.

II. FINDINGS OF FACT

1. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., engaged in underwriting and selling credit property insurance and credit involuntary unemployment insurance in the State of West Virginia.

2. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., has written credit involuntary unemployment insurance in the State of West Virginia from a time period including 1994 to the present.

3. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., has written credit personal property insurance in the State of West Virginia from a time period including 1994 until 2003.

4. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., during the referenced time periods of the administrative complaint made approximately five (5) filings concerning the products referenced including three (3) filings of

credit involuntary unemployment insurance and two (2) filings of credit personal property insurance.

5. West Virginia has not adopted a benchmark minimum loss ratio rule concerning credit involuntary unemployment insurance.

(Credit IUI Filing #1 - March 17, 1997)

6. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made an involuntary unemployment filing on or about March 17, 1997 (Reference# 97030468) which was a single premium policy covering closed-end consumer loans. The terms of coverage were twelve (12) to sixty (60) months. The benefit period was four (4) to twelve (12) months depending upon the loan terms.

7. The Insurance Commissioner finds that the referenced March 17, 1997 filing of Triton Insurance Company, an affiliate of CitiFinancial, Inc., is reasonably complete and typical for this type of product filing. It is not unusual for companies filing nationwide programs to use nationwide data to support initial or subsequent rate filings or if state-wide experience lacks credibility.

8. Credit involuntary unemployment experience varies significantly by many factors, not the least of which are underlying loan characteristics. For this reason, a program may be "new" in that existing programs may cover unrelated population or loan types.

9. The Insurance Commissioner fulfilled her duty to review and approve the rates in this referenced March 17, 1997 filing including seeking justification for the rates and initially disapproved them. After further information was obtained by the Insurance Commissioner, this filing was approved.

10. The Credit Insurance Experience Exhibit data, in particular, is of limited use due to aggregation of all of Triton Insurance Company's business based on premium and benefit type, regardless of individual program characteristics or experience.

(Credit IUI Filing #2 - February 16, 1999)

11. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made an involuntary unemployment filing on or about February 16, 1999 (Reference# 99020395) which is a monthly premium loss of income and family leave product. The product was filed as a "new" program as its parameters of coverage and intended policyholders were different in that loans covered would be credit card indebtedness. The benefit period was twelve (12) to fifty-seven (57) months depending upon the minimum payment percentage.

12. The premium components are very much in line with similar filings by this insurer and other insurers providing involuntary unemployment in states where the rate is not specified by law or regulation.

13. Involuntary unemployment coverages on credit cards may exhibit different claim cost experience from consumer loans and these both may be different from larger, long term mortgage loans.

14. The Insurance Commissioner, after review, approved the filing of February 16, 1999.

(Credit IUI Filing #3 - February 26, 2001)

15. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made an involuntary unemployment filing on or about February 26, 2001

(Reference# 151996) which was a monthly premium product and a new program from the prior referenced filing above of March 17, 1997 for closed-end consumer and mortgage loans. Terms of coverage were zero (0) to three hundred and sixty (360) months. Benefit periods were for four (4) to twenty-four (24) months depending upon loan term.

16. The premium components are very much in line with similar filings by this insurer and other insurers providing involuntary unemployment in states where the rate is not specified by law or regulation.

17. The program filed on or about February 26, 2001 was a longer term and higher loan amount program which is thought to have higher incidence rates than short-term consumer loans and consequently, rate equivalence may not infer similar experience.

18. This filing of February 26, 2001 was approved by the Insurance Commissioner.

(Credit Property Filing #1 - January 19, 1996)

19. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made a credit property filing on or about January 19, 1996 (Reference# 96010578) for single premium dual interest credit property with a non-filing endorsement. Loans covered would be closed-end consumer loans. This was a new program. Terms of coverage were zero (0) to sixty (60) months.

20. The filing referenced above of January 19, 1996 is complete and reasonable. Extensive justification was given for the investment income offset. It is not unreasonable to use modified homeowners' loss statistics in a program that is new. To what extent actual experience varies from homeowners and in which direction depends on many variables, including location

of the property insured. The premium components are very much in line with similar filings by this insurer and others insurers.

21. Credit property and credit involuntary unemployment are potentially unstable products from an industry perspective in that there are years where losses are low, but the occurrence of economic uncertainty, recession and/or natural disaster may cause dramatic increases in loss ratios up to and exceeding 100%.

22. The Insurance Commissioner initially questioned the rates as appearing high and received additional explanation from Triton to the extent that it satisfied the reviewer and the rate filing was approved.

23. Particular care should be exercised when attempting to derive applicable company experience from publicly available data. The Credit Insurance Experience Exhibit was changed in 2004 to split out the various types of programs that fall under the definition of credit property, so there is a necessary "break" in how companies report their data year-by-year. Further, there is discrepancy in how companies actually reported this data and under which line of authority which makes use of aggregate national data possibly unreliable.

24. There are basic and fundamental differences between Credit Personal Property which is generally included at the time of financing and Creditor-Placed coverage which is added after the failure to maintain required coverage on financed automobiles or houses.

(Credit Property Filing #2 - June 5, 2003)

25. The Insurance Commissioner finds that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made a credit property filing on or about June 5, 2003 (Reference# 30606009) dealing with single premium dual interest credit property rate adjustment covering

credit property forms included in the previously referenced filing on credit property reference number 96010578.

26. Triton was questioned concerning their filing and their rate decrease request of 49.13%. The Insurance Commissioner thoroughly reviewed the filing and after extensive questioning, Triton withdrew the rate filing in its entirety.

27. Triton discontinued the issuance of credit personal property insurance in the State of West Virginia on or about July 17, 2003.

28. On or about July 31, 2003, W.Va. Code R. §114-61-1, *et seq.* (2003), which was previously adopted by the West Virginia Legislature, became effective for credit property insurance requiring a benchmark 60% loss ratio minimum.

(Additional Findings)

29. The Insurance Commissioner finds that during the period contained in the Complainant's administrative complaint, Triton did not write credit property nor credit involuntary unemployment insurance wherein any rule was in effect concerning benchmark minimum loss ratio standards for writing either product in the State of West Virginia.

30. The Insurance Commissioner finds that both parties were able to provide relevant information, data or other comment concerning their respective positions in the context of her investigation and analysis of these violations to fulfill her duties under West Virginia Code §33-20-5(c) (1967).

31. The Insurance Commissioner finds that the filings made by Triton were complete and approved in a going forward basis at the time of filing. The Insurance Commissioner believes due diligence and review of its responsibilities were completed and adequately

conveyed to the company. The Insurance Commissioner finds that it is reasonable that a company may rely on an approved filing from the Insurance Commissioner in doing its business in the State of West Virginia.

32. The Insurance Commissioner is aware of no duty placed upon insurers offering insurance as referenced in the Complainant's administrative complaint to re-file rates once approved where there is no change in circumstances of the original filing.

33. The Complainant has not alleged nor raised the issue or provided any proof whatsoever that the insurer, Triton Insurance Company, charged a rate to a consumer in excess of that approved by the Insurance Commissioner.

34. Rates filed by insurance companies in other states are neither necessarily relevant nor dispositive as to what a rate should be in the State of West Virginia.

35. Historically low loss ratios in relation to what is filed as anticipated loss ratios with the Insurance Commissioner concerning credit property and/or credit involuntary unemployment insurance written during the periods alleged in the Complainant's administrative complaint and under existing parameters of law at those times do not by themselves constitute an excessive rate violation.

36. There are many factors that affect actual experience under insured programs of credit involuntary unemployment and credit personal property. It is not unusual for a company to develop initial expected claims costs based on nationwide average data from available sources for a nationwide program. The claim ratios have been known to fluctuate widely from company to company, state to state and year to year. Due to this volatility, it is not unusual for initial claims costs estimates to be different from emerging experience. Some of this fluctuation is

simply random. Specific factors such as geography, type of industry, economic cycle, amount of monthly payment, type of underlying loan and duration of coverage can affect claims costs for involuntary unemployment. Specific factors such as covered perils, ancillary benefits, type of property covered, geography, location of property, type of lender and structure of underlying loan can affect claims costs for credit property.

37. The Insurance Commissioner finds that any conclusion of law that is more properly a finding of fact is incorporated herein.

38. The parties by mutual agreement, and to allow the Insurance Commissioner more time to investigate and analyze the complexity and remoteness of the administrative request, agreed on two separate occasions to continue the demand of the Complainant for a hearing and determined a final action date to be March 31, 2010 to trigger the requirements of W.Va. Code R. §114-13-1, *et seq.* (2003).

III. CONCLUSIONS OF LAW

A. Pursuant to W.Va. Code §33-20-3(a) (2006), "All rates shall be made in accordance with the following provisions: (a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state and to all other relevant factors within and outside of this state."

B. The Insurance Commissioner finds that Triton Insurance Company did in fact comply in its referenced filings herein with the provisions of W.Va. Code §33-20-3 (2006).

C. Pursuant to W.Va. Code §33-20-3(b) (2006), "All rates shall be made in accordance with the following provisions: (b) Rates may not be excessive, inadequate or unfairly discriminatory."

D. The Insurance Commissioner finds that Triton Insurance Company's rate filings referenced herein this Order did not violate W.Va. Code §33-20-3 (2006).

E. Pursuant to W.Va. Code §33-20-4(d) (2005), "The commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this article."

F. The Insurance Commissioner finds that the Offices of the Insurance Commissioner complied with the requirements of above referenced paragraph "E" and approved the filings of Triton Insurance Company in the normal course of business for the agency.

G. Pursuant to W.Va. Code §33-20-4(e) (2005), "...A filing shall be deemed to meet the requirements of this article unless disapproved by the commissioner within the waiting period."

H. The Insurance Commissioner finds that the filings of Triton Insurance Company referenced herein this Order and subject of the Complainant's administrative complaint are deemed to meet the requirements of Chapter 33, Article 20 of the West Virginia Code with the exception of the last filing of June 5, 2003 which was withdrawn by Triton Insurance Company in its entirety and therefore not subject to further action by the Commissioner.

I. The Insurance Commissioner finds that pursuant to W.Va. Code §33-20-5(c) (1967), that she has not found the filings referenced herein this Order and subject of the

Complainant's administrative complaint to be deficient nor failing to meet the requirements of this article. Consequently, any disapproval of the referenced filings would not be warranted.

J. The Insurance Commissioner finds that pursuant to W.Va. Code §33-6-30(b) (2002), "the Legislature finds: **(1)** That consumers and insurers both benefit from the legislative mandate that the Insurance Commissioner approve the forms used and the rates charged by insurance companies in this state; **(2)** That certain classes of persons are seeking refunds of insurance premiums and seeking to void exclusions and other policy provisions on the basis that insurance companies allegedly failed to provide or demonstrate a reduction in premiums charged in relation to certain terms or exclusions incorporated into policies of insurance; **(3)** That historically, as a prerequisite to a rate or form being approved, neither the Legislature nor the Insurance Commissioner has ever required that the insurer demonstrate that there was a specific premium reduction for certain exclusions incorporated into policies of insurance; **(4)** That the provisions of this chapter were enacted with the intent of requiring the filing of all rates and forms with the Insurance Commissioner to enable the Insurance Commissioner to review and regulate rates and forms in a fair and consistent manner; **(5)** That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds when the form used and the rates charged by the insurance company have been approved by the Insurance Commissioner; **(6)** That actions seeking premium refunds or partial premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the Insurance Commissioner's approval of the forms used and the rates charged insureds; and (7) That it is in the best interest of the citizens of this state to ensure a stable insurance market."

K. That pursuant to W.Va. Code §33-6-30 (c) (2002), "Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter", the Insurance Commissioner finds that the forms and rates were approved by the Insurance Commissioner and, therefore, presumed to be in compliance with Chapter 33 of the W.Va. Code. Further, the Commissioner has been provided with no information that would in fact rebut such a presumption.

L. The Insurance Commissioner finds there is no factual dispute as concerning the filing and approval of the rates and forms of Triton Insurance Company as referenced herein this Order and subject of the Complainant's administrative complaint.

M. The Insurance Commissioner finds that the rates charged by Triton Insurance Company were reasonable in relation to the benefits provided.

N. The Insurance Commissioner finds that any finding of fact that is more properly a conclusion of law is incorporated herein.

O. The Insurance Commissioner finds that the Complainant has demanded a hearing pursuant to W.Va. Code §33-20-5(d) (1967), "Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon." This administrative hearing request is also accorded to individuals pursuant to W.Va. Code §33-2-13 (1957).

P. However, pursuant to a Legislative adopted rule, W.Va. Code R. §114-13-1, *et seq.* (2003), "3.3. Hearing on written demand. -- When the commissioner is presented with a demand for a hearing as described in subsections 3.1 and 3.2 of this section, he or she shall

conduct a hearing within forty-five (45) days of receipt by him or her of such written demand, unless postponed to a later date by mutual agreement. However, if the commissioner shall determine that the hearing demanded: a. Would involve an exercise of authority in excess of that available to him or her under law; or b. Would serve no useful purpose, the commissioner shall, within forty-five (45) days of receipt of such demand, enter an order refusing to grant the hearing as requested, incorporating therein his or her reasons for such refusal. Appeal may be taken from such order as provided in W. Va. Code §33-2-14."

IV. ORDER

It is hereby **ORDERED** pursuant to the above referenced Findings of Fact and Conclusions of Law that the Complainant's request for hearing upon his administrative complaint would serve no useful purpose for the reasons stated above. Consequently, the request for hearing is **DENIED**.

An appeal may be taken from this Order as provided in W.Va. Code §33-2-14 (1957).

It is further **ORDERED** that a copy of this Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant be sent to the designated counsel contact of record as provided by the parties to: **Jonathon Bridges, Esq., SUSMAN GODFREY, L.L.P., Suite 5100, 901 Main Street, Dallas, Texas 75202-3775; and Jeffrey Wakefield, Esq., FLAHERTY, SENSABAUGH & BONASSO, PLLC, P. O. Box 3843, 200 Capitol St., Charleston, WV 25338-3843.**

It is finally **ORDERED** that this matter be stricken from the docket.

Enter this 5th day of April, 2010.

Jane L. Cline
Insurance Commissioner
State of West Virginia

CERTIFICATE OF SERVICE

I, Christopher J. Regan, counsel of record on appeal for Petitioner Paul Lightner, certify that on this 24th day of April, 2012, I served the foregoing **NOTICE OF APPEAL** with all attachments thereto via e-mail and/or by mailing a true and correct copy thereof in the United States Mail, postage prepaid, and addressed as follows:

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